**Triple A Fire Protection, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL–CIO.** Case 15–CA–11498

October 31, 1994

## SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On January 19, 1994, Administrative Law Judge Richard J. Linton issued the attached supplemental decision.[1] The Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings as modified,[3] and conclusions[4] and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Triple A Fire Protection, Inc., Semmes, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On October 19, 1993, the Board reversed the judge, found that the collective-bargaining agreement between the parties was a 9(a) contract, and remanded the case to the judge to address the merits of the complaint's allegations that the Respondent made unlawful unilateral changes and bypassed the Union by dealing directly with the employees. 312 NLRB 1088.

[2] The General Counsel filed motions to strike the Respondent's brief in support of exceptions and reply brief because each (with the appendices attached) exceeded the page limits allowed in the Board's Rules. Having examined the contents of the appendices, we do not agree with the General Counsel that the Respondent's appendices are attempts to evade the page limitations of Sec. 102.46(h) and (j) of the Board's Rules. The motions are denied.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the fourth sentence of the first paragraph in sec. III,D,1,b, ''1993'' should read ''1991.'' We correct this inadvertent error.

We also note that in sec. III,E,2, what the judge quotes as the Respondent's answer to par. 12 of the complaint is actually an answer to another paragraph. The correct quotation should read:

> Triple A denies the averments of paragraph 12 of the complaint, except Triple A admits that pursuant to written notice to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL–CIO (Union), dated April 12, 1991, Triple A on May 14, 1991, effective April 22, 1991, ceased making fringe benefit payments which had been required by the 8(f) prehire agreement that expired on March 31, 1991.

Finally, we note that no exceptions were filed to the judge's supervisory status findings.

[4] In adopting the judge's finding that the parties did not reach impasse after April 22, 1991, and that therefore the Respondent's remedial obligations were not tolled, we note in addition that at no point after April 22, 1991, did the Respondent declare that the parties were at impasse, nor did it announce that it was reimplementing its final contract proposal. Rather, the parties continued to discuss contract proposals and bargaining was not deadlocked on any topic.

Because Member Browning agrees with her colleagues and the judge that the parties did not bargain to a good-faith impasse after the Respondent implemented its unilateral changes on April 22, 1991, she finds it unnecessary to consider whether events after April 22 could operate to toll the Respondent's liability. She would not rely on *Dependable Maintenance Co.*, 274 NLRB 216 (1985), supplemental decision 276 NLRB 27 (1985).

*Keith R. Jewell, Esq.* (trial and original brief) and *Stephen C. Bensinger, Esq.* (supplemental brief), for the General Counsel.

*Willis C. Darby Jr., Esq.*, of Mobile Alabama, for the Respondent.

*Richard W. Gibson, Esq. (Beins, Axelrod, Osborne & Mooney)*, of Washington, D.C., for the Charging Party.

## SUPPLEMENTAL DECISION ON REMAND

### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. Finding only an expired 8(f) contract in my initial decision in this case, I dismissed the complaint. After reversing my finding of no contract under Section 9(a) of the Act, the Board remanded this case for me to address the merits of the complaint's unilateral change and other allegations. *Triple A Fire Protection*, 312 NLRB 1088 (1993). As necessary, I shall restate the summary from my initial decision to avoid causing the parties to have to switch between decisions while reading.

Respecting the merits, I find that, as alleged by the General Counsel, TAF bypassed the Union and dealt directly with its employees in February and March 1991, and made unilateral changes on April 22, 1991, all in violation of Section 8(a)(5) and (1) of the Act. Finding no merit to TAF's affirmative defenses, and finding no impasse in the bargaining which occurred after the unilateral changes of April 22, I order TAF to cease its unlawful conduct, to make whole all benefit funds and any bargaining unit employees, and, on request by the Union, to rescind any of the unilateral changes made.

I presided at this 7-day trial, opening August 25, 1992, and closing December 17, 1992, in Mobile, Alabama, pursuant to the September 27, 1991 complaint issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 15 of the Board.

The complaint is based on a charge filed April 4, 1991, and later amended, by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL–CIO (the Union, Local 669, or the Charging Party) against Triple A Fire Protection, Inc. (Respondent, Company, TAF, or Triple A). Following the Board's remand, the hearing was not reopened.

In the Government's complaint the General Counsel alleges that Respondent TAF violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), when (1) Alton Turner (Turner), Company's president, bypassed the Union and dealt directly with TAF's employees by various acts between about late February 1991 and March 1991, and (2) when Steve Turner, an admitted supervisor of the Company, also bypassed Local 669 about March 1991. The complaint also alleges that since about April 20, 1991, the Company unilaterally (1) has ceased making fringe benefit-payments required by the collective-bargaining agreement (CBA) and (2) has changed the wage rates of employees covered by the CBA which expired March 31, 1991.

Aside from admitting some facts, Triple A denies any violation of the Act, alleges that the CBA was an ''8(f)'' prehire agreement, and asserts three affirmative defenses: (1) the Union has never represented an uncoerced majority of Triple A's employees in an appropriate unit; (2) since March 1, 1990 (at trial TAF's counsel gives the more likely date of April 1, 1991), the Union has failed to bargain in good faith with Company; and (3) the Union waived any right it may have had to bargain over proposed changes in wage rates and fringe benefits by failing to act with due diligence.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering (as to the remanded issues) the original briefs and the supplemental briefs[2] filed by the General Counsel (whose briefs include a proposed order and notice), Local 669 (with proposed order and notice), and Triple A, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

An Alabama corporation, Respondent Triple A operates from Semmes (Mobile), Alabama, where it is engaged in the nonretail installation of sprinkler systems. During the 12 months ending August 31, 1991, the Company purchased and received at its Semmes facility goods and materials valued at $50,000 or more direct from points outside Alabama. Respondent TAF admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Unless otherwise indicated, all dates are for 1991. References to the seven-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's, C.P. Exh. for the Union's, and R. Exh. for Respondent TAF's.

[2] By motion dated October 28, 1993, TAF sought leave to file copies of the cross-exceptions and brief which it had filed with the Board. I denied that motion in an all-party telephone conference call held November 1, 1993. At the same time I set a date for any party so desiring to mail to me supplemental briefs addressing the remanded issues.

### II. LABOR ORGANIZATION INVOLVED

TAF admits, and I find, that Road Sprinkler Fitters Local Union No. 669 is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. § 152(5).

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *Background*

##### 1. Collective-bargaining history

Alton Turner began working in the sprinkler fitting industry about 1972 or 1973. (6:1029, 1155.) At that time he joined Local 669. (6:1027.) Some 10 years later, about 1983, Turner founded his own company to engage in that business, incorporating Triple A about 1983. (1:190; 2:290.) Turner, who is president of TAF, holds a 51-percent majority of the Company's stock and runs the business. (1:191.) Turner's wife, Lovina, owns the balance of the stock and is TAF's secretary and treasurer. (7:1252–1253, 1269.) She also serves as Turner's office secretary. (1:198, 215; 7:1253). Turner's son, Steve, is an acknowledged statutory supervisor for TAF. Other family members also work for TAF. (7:1253–1254.)

Local 669 is headquartered in Landover, Maryland (2:319) where H. V. Simpson is the Union's business manager. (1:125; 2:319.) Ronnie L. Phillips has worked 15 years for Local 669, and is a business agent of the southern district and a regional representative for the Union. His area covers Alabama, Mississippi, and Puerto Rico. Since 1983 Phillips, on behalf of the Union, has dealt with Turner respecting all matters between Local 669 and TAF. (2:299–300; 316; 4:650; 5:819.)

The Union's territorial jurisdiction receives different descriptions in the record. (1:34; 2:319; 5:836–838, 855–856, 881.) However, articles in the 1988–1991 national CBA (G.C. Exh. 21; R. Exh. 41) for recognition (art. 3) and territory (art. 6) disclose that it covers offshore drilling operations plus 47 States and the District of Columbia, but not Connecticut (Local 676), Florida (Local 821), and the territory covered by locals in some 18 cities. Rhode Island apparently is covered by the Providence Local. The matter of TAF's desire to be able to do business outside Alabama, particularly in Florida, arose during the negotiations between Local 669 and TAF.

For years Local 669 has entered into national CBAs with the National Fire Sprinkler Association, Inc. (NFSA). A copy is in evidence, for historical purposes only (6:1049), of the CBA for April 1, 1982, through March 31, 1985. (R. Exh. 18.) In October 1983 Turner, as president of TAF, signed an interim agreement (R. Exh. 20) to be bound to the 1982–1985 contract (1:192; 6:1051), and on February 8, 1984, he signed a one-page (R. Exh. 22; 7:1288) amendment to the economic package. Turner also signed to be bound to the national CBA of 1985–1988. (G.C. Exh. 20; G.C. Exh. 2; 1:193–194.)

Triple A, by Turner, also signed (G.C. Exh. 2: 1:193–194) to be bound to the national CBA of April 1, 1988, through March 31, 1991. (G.C. Exh. 21; R. Exh. 41; 2:301.) As we shall see, on March 31, 1991, the 1988–1991 CBA expired as to TAF. On April 9 the Union and TAF began independent negotiations for a CBA, but after a dozen or so meetings, the last one held in July 1992, there still was no agreement

for a replacement contract. The 1988–1991 CBA's recognition clause, in article 3, provided:

> *Recognition*: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

The Board has found that Local 669 enjoys a 9(a) relationship with TAF, and that the expired 1988–1991 collective-bargaining agreement (CBA) was effective under Section 9(a) of the Act. 312 NLRB 1088. Thus, although TAF reurges its arguments that the CBA was an 8(f) contract and that the Union never represented an uncoerced majority of its employees, I shall not address them because the Board's decision resolves the matter at this level. Presumably TAF reurges them here because (1) the Board's remand is not an appealable final decision and (2) because TAF wants to avoid any claim of waiver.

2. Events preliminary to 1991–1992 negotiations

By letter dated December 14, 1990 (R. Exh. 5), the Union, by Business Manager Simpson, notified ''All Independent Local 669 Contractors'' of the Union's desire to negotiate a renewal CBA effective April 1, 1991. If a renewal contract were not reached before March 31, Simpson warned, ''lawful economic action'' could ensue on and after April 1. Simpson enclosed two copies ''of our Assent and Interim Agreement'' to consider, sign, and return. (2:413.) A copy of the type of assent and interim agreement that was enclosed is separately in evidence as Respondent's Exhibit 14. (3:621–624.)

Under the two-page assent and interim agreement form (R. Exh. 14) which Simpson mailed to TAF, the Union would agree not to strike to obtain a successor CBA to the one expiring March 31, 1991. The parties would agree, among other provisions, that all terms of the current CBA would remain in effect until the effective date of the successor CBA, with increases in wages and fringes retroactive to April 1, 1991.

Apparently around mid-March 1991 Simpson, Phillips testified (2:415), telephoned Phillips and informed him that Turner had failed to sign and return the assent and interim agreement. On March 18 Phillips telephoned Turner and, Phillips testified, asked if they could meet to discuss negotiations for a renewal contract. Turner said he had business in Atlanta the next day. They set no date to meet. (2:302–303, 337; 3:578.) With an important exception, Turner's version of the call is generally consistent with that of Phillips. (6:1086–1087.) The main difference is Turner's assertion that Phillips asked whether Turner was going to sign the interim agreement. (6:1087.)

At several points in his testimony Phillips clearly denies that he even mentioned the interim agreement to Turner. (2:373, 413, 417.) That was before it was disclosed that Turner had tape recorded the March 18 telephone conversation. A transcript (R. Exh. 11) of that telephone conversation was received in evidence. (3:576, 609.) Later, in conjunction with other tape recordings excluded on the basis they pertained to settlement discussions of a related matter (5:780, 790), the Union moved (C.P. Exh. 8; 4:641; 5:792; 6:942) to strike the transcript (R. Exh. 11). The General Counsel joined in that motion. (6:948.) The Union so moves on the basis that Board policy excludes from evidence any secret tape recordings of conversations which involve contract negotiations. *Carpenter Sprinkler Corp.*, 238 NLRB 974, 975 (1978), enfd. on point 605 F.2d 60 (2d Cir. 1979). I postponed ruling until this decision. (6:953.)

The taped telephone conversation of March 18 focused on the interim agreement and when the parties could meet and discuss contract negotiations. As such topics appear to fall within the rule of *Carpenter Sprinkler*, I grant the Union's motion, strike Respondent's Exhibit 11, and transfer Respondent's Exhibit 11 to the rejected exhibits file. On the same basis I transfer Respondent's Exhibit 94 to the rejected exhibits file. (7:1297.) Respondent's Exhibit 94 is the transcript of a tape recording which Turner secretly made of his April 3, 1991 telephone conversation with Phillips concerning the beginning of contract negotiations.

Although Phillips testified that he never asked Turner to sign an interim agreement (2:412; 3:577), he clearly asserts that he never mentioned the term (2:373, 413, 417) during the telephone conversation. Later he admits that he did mention it and that when he did so he was referring to Respondent's Exhibit 14. (3:622.)

On March 19, the day following the March 18 telephone conversation, Phillips made a surprise visit to Triple A and found Turner there. (2:303, 337, 416; 6:1088.) Turner testified that the Atlanta trip canceled, but concedes he did not notify the Union. (6:1168–1169.) Accompanying Phillips was Clarence Radecker (2:304), a business agent from the Union's Arkansas-Louisiana District 6. (7:1339.) Phillips testified that he went there to set up contract negotiations. (2:304, 340, 416.) Phillips testified that Turner said he had no intention of negotiating a CBA with Local 669. (2:304, 307.) (Radecker was not called as a witness until rebuttal and therefore did not address this visit.)

Turner testified that Phillips asked if Turner was going to sign the contract. Turner asked what the contract consisted of. (Jack Moiren and Alan Thames also were present.) It was not yet complete, Phillips advised. Phillips then called Turner aside and asked if Turner would go ahead and sign the (interim) agreement, that he had a copy in his briefcase in his car. (According to Phillips, 2:240, 417, neither he nor Radecker had a copy of the interim agreement with him that day.) ''No,'' Turner responded, explaining that he would not sign a blank check. (6:1088–1090.) At about that point Phillips said they had to discuss a contract. Turner said he was preparing a proposed contract to submit to him later. (6:1130–1133.)

Two days later, by letter dated March 21 (G.C. Exh. 22), Phillips wrote Turner. After referencing their March 18 and 19 contacts, Phillips accused Turner of refusing to bargain, expressed puzzlement at that, and suggested a need ''to avert a work stoppage on April 1, 1991.'' Crossing that letter in the mail was Turner's letter of March 21 (G.C. Exh. 7) transmitting TAF's proposal (G.C. Exh. 8) for a complete contract. (1:220–222; 6:1157.)

In the meantime the Union had been alerting its membership to a possible strike beginning April 1. The Union's March 1991 newsletter (R. Exh. 88) did so. Business Manager Simpson, by a special strike notice to all members (R. Exh. 6), dated March 22, advised that effective April 1 ''*WE ARE STRUCK*'' against any contractor not named on an attached list of over 200 signatory contractors. Triple A is not 1 of the 200-plus names. (2:427.) Phillips so notified TAF's employees when he met with them shortly before April 1. (2:427; 5:920–921; 6:992–993.)

By letter dated March 26 (G.C. Exh. 9), Turner wrote Phillips that strike replacements would be hired and paid under the terms of TAF's proposed CBA which TAF had mailed to the Union by letter of March 21. Current employees represented by the Union would continue to be paid under the CBA ''until further notice.'' The further notice was expressed in a separate letter (R. Exh. 89) of the same date, March 26, in which TAF notified the International Union that TAF ''hereby terminates'' the CBA ''effectively immediately or as soon as permitted by applicable law.''

On March 28 (7:1281) Turner, in a two-page memo (C.P. Exh. 5), summarized the CBA status, discussed union fines and possible options for employees who desire to work, notified TAF's employees that TAF would be open for business on April 1, and would have to operate with, if necessary, new employees.

Before April 1, however, Phillips told TAF's employees there would be no strike and to report to work on April 1. (2:430; 6:993.) Phillips did not notify Turner there would be no strike. (2:430.) There was no strike or picketing by the Union on April 1 at TAF. (2:309, 318, 429; 6:1012–1013.) Turner thought there would be a strike on April 1 (2:293), and he made preparations for a strike. (6:1094.) There is no strike allegation in the complaint. TAF's position is that the strike notice bears on TAF's further position that the Union's contract demands caused an impasse. (2:432–434.)

On April 3 Turner and Phillips agreed to meet for bargaining, and to hold the first session on April 9. (2:309). On April 4 Turner wrote (G.C. Exh. 10; R. Exh. 98) confirming a CBA meeting for April 9. (1:227; 5:919; 6:1095.) Phillips confirmed by his letter of April 5. (G.C. Exh. 23; 2:310.) Turner observed that although TAF had forwarded a complete contract proposal, TAF had not received the Union's counterproposal and would like to have it for review before the April 9 meeting. The next day Phillips, by his letter of April 5 (G.C. Exh. 23, apparently crossing R. Exh. 98 in the mail), confirmed the first meeting date of April 9 for CBA negotiations, stated he had questions concerning TAF's proposed contract, and asserted that he had some contract proposals of his own which he would present at the meeting.

The parties held their first bargaining session on April 9, 1991, at the Bradbury Inn in Mobile. At this point I pause only to list the dates of the 10 or so meetings. I write ''or so'' because the parties list 13 scheduled meetings even though bargaining occurred only at 9 or 10. For example, the parties refer to one meeting date, May 21, as a meeting. Although the third meeting was scheduled for May 21, TAF's representatives arrived a few minutes late, the Union left (there is a dispute whether the Union's representatives saw TAF's representatives entering the parking lot), and no bargaining occurred until the next day, May 22. Similarly, no bargaining occurred at the eighth meeting on October 8 because Turner, who had broken a tooth the previous evening, left early for an emergency dental appointment. Finally, no bargaining occurred at the 10th meeting on January 14, 1992. There is a dispute over attendance. Accordingly, the actual 10 bargaining sessions are (plus the aborted meetings of May 21, October 8, and January 14 shown in brackets):

1. 4–9-91
2. 4–30–91
3. [5–21–91]
4. 5–22–91
5. 6–25–91
6. 6–26–91
7. 8–28–91
8. [10–8–91]
9. 11–25–91
10. [1–14–92]
11. 2–18–92
12. 3–17–92
13. 7–16–92

On April 10 the Union, by Business Manager Simpson, sent a two-page special notice (R. Exh. 104) to all members informing them that agreement had been reached for a renewal 3-year national CBA, wages retroactive to April 1 within 30 days of ratification. Phillips acknowledges that he never delivered a copy of the new (1991–1994) CBA to TAF. (3:618, 621.) Although no copy of the national 1991–1994 CBA is in evidence, Simpson's April 10 announcement (R. Exh. 104) summarizes the highlights, including the increased wages and benefits, of that new contract. Following the final (and abbreviated) meeting on July 16, 1992, the Union wrote (R. Exh. 224) that it was willing to continue negotiations. TAF did not respond, and no further meetings have been held.

### B. *Introduction*

Aside from the nature of the 1988–1991 CBA (now established to be a 9(a) CBA rather than an 8(f) contract), the complaint alleges direct dealing and unilateral changes in violation of Section 8(a)(5) and (1) of the Act. My findings follow respecting the allegations, with the direct dealing addressed first. Because the status of foremen as employees or supervisors is relevant to the direct dealing allegation, I shall make findings on that topic.

### C. *Job Foremen Not Statutory Supervisors*

#### 1. Introduction

Although the recognized bargaining unit under the CBA does not specify foremen (G.C. Exh. 21 at 4), the CBA provides (art. 9) that foremen will be selected by the employer from its journeymen and will be paid $1.25 per hour more than the journeyman's rate. Under article 9 of the CBA the employer must assign a foreman for each job. Selection of a foreman is the employer's province. (G.C. Exh. 21 at 12). TAF contends that during the relevant time the unit included two foremen who were statutory supervisors. (1:178.) Apparently the two were Jack Moiren and Cecil P. Davidson.

#### 2. Applicable law

In assessing the facts on this issue, I am guided by the applicable law as summarized in *Adco Electric*, 307 NLRB 1113 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993). The first important *Adco* point I shall emphasize here is that the party asserting supervisor status has the burden of persuasion on the issue. Id. fn. 3 and 1119.

The second point from the *Adco* summary which I highlight here is, ''Exercise of the authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated in the statutory definition.'' Id. at 1120.

The third point from the summary is that the powers enumerated at 29 U.S.C. § 152(11) are termed the ''primary'' indicia of supervisory status. When the issue of supervisory status presents a borderline question, ''secondary'' indicia may be considered. Nevertheless, ''secondary'' indicia alone will not confer supervisory status under the Act. *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Adco* at 1120. Even the ''primary'' powers must be linked to the use of or need to exercise independent judgment. *Adco* at 1120.

Finally, ''In these cases the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor loses his protected right to organize, a right Congress intended to protect by the Act.'' *Northcrest Nursing Home*, supra, 313 NLRB at 491; *Adco* at 1120 (citations omitted).

3. Facts

Evidence on the supervisor question is quite limited, with Turner never addressing the matter when he testified. The bulk of the evidence comes from the testimony of Jack Moiren and Cecil P. Davidson, job foremen during the relevant time.

Most of the time the job foremen served as part of three-man crews, the number including themselves. As job foreman Langford in *Adco*, 307 NLRB at 1124, the job foremen here spend about 90 percent of their time working with the tools and the other 10 percent on paperwork and training their apprentices/helpers. They do not independently hire workers. Instead, the instances in which they successfully recommended that someone, usually a relative, be hired, constitute nothing more than the recommendations of skilled craftsmen referring and recommending others from a pool of qualified craftsmen. That is not indicative of statutory authority. *Adco* at 1120, 1124. The testimony by Phillip Alan Thames that he was hired by his foreman uncle, Ronnie Pugh (6:955–956, 964), does not establish that Pugh independently hired Thames. The evidence supports the equal inference that Pugh, as a skilled craftsman, simply recommended Thames and Turner authorized Pugh to hire Thames. In the circumstances here, that action does not indicate statutory authority.

Hours and overtime are matters preset by TAF. Although neither Turner would visit some of the jobs outside Mobile, their absence merely reflects the experience level of the job foremen as skilled craftsmen.

Transfers to and from the crews come at the direction of the Turners, generally after discussion with the foremen about the progress of the job. When a larger crew is downsized to fit reduced job needs, any selection of crewmembers by the job foremen for release back to the office for reassignment is the function of the foremen in their capacity as skilled craftsmen matching crew skills with job needs. The foremen do not resolve grievances. No evidence of disciplinary action by the foremen, exercising independent judgment, was adduced.

4. Conclusions

TAF has failed to show that the job foremen, and particularly Jack Moiren or Cecil Davidson, possessed any of the primary indicia of a statutory supervisor, or that they exercised any of those powers with independent judgment. As TAF has failed to carry its burden of demonstrating statutory supervisor status on the part of the job foremen, including Jack Moiren and Cecil Davidson, I find that at all relevant times Triple A's job foremen were statutory employees.

D. *Direct Dealing*

1. Alton Turner

a. *Introduction*

Witnesses who are either employees or former employees of the Company describe the following conversations. In his own testimony, Turner does not address these conversations. I credit the Government's witnesses.

b. *Complaint paragraphs 10(a) and (b)*

Danny Carpenter worked for the Company from February 1988 to September 1991. (1:172, 184.) He became a journeyman fitter in January 1991. (1:173.) He and Turner were social friends, sipping beer on a few occasions. (1:188–189.) About late February 1993 to early March, Carpenter testified, as employees Carpenter, Jack Moiren, and Alan Thames were standing at the shop's doorway with Turner, Turner told the three employees that he might not sign the union contract and that he would guarantee each a foreman's job, pay their insurance, and provide them a truck.

About mid-March 1991, as Turner was visiting at Carpenter's house, Carpenter testified, Turner said he probably was not going to sign the upcoming union contract. Asking Carpenter to stay with TAF, Turner said he would raise Carpenter's pay to a foreman's rate. (1:174–175, 184–186.)

c. *Complaint paragraph 10(c)*

Jack Moiren worked at the Company for about 6 years, from 1985 to September 1991. (1:65, 76, 83.) For his last several years at Triple A, Moiren worked as a foreman. (1:65, 116.) Moiren has been a member of the Union for about 20 years. (1:65.)

About early March at the shop, Moiren testified, Turner asked whether Moiren would stay with him if Turner went nonunion. Turner said that if Moiren stayed his pay would remain at the union rate, he would receive raises when union pay rates increased, would get to keep the company truck he was driving, with gas paid, that he would be provided insurance, and something would be worked out for retirement. (1:66–67, 99–100.)

d. *Complaint paragraph 10(d)*

Cecil P. ''Shorty'' Davidson has worked three different times for the Company, the first from October 1985 to about October 1986, again from September to November 1987, and finally from September 1989 to August 1991. (1:40.) Davidson became foreman about February 1990 (1:151), and was such in March 1991. (1:151.)

About early to mid-March 1991, Davidson testified, he, Jack Moiren, Danny Carpenter, and the Turners (Alton,

president and father, Steve, supervisor and son) had a lengthy conversation on the front porch of the Company's office. At one point the conversation turned to the pros and cons of working Union and nonunion. Toward the end of the topic, Turner told Davidson that Davidson had a job there no matter what happened, and that Davidson could have insurance by paying one half the premium. At that time Davidson paid no part of the cost of the insurance which Company provided. (1:140–142, 151–152.)

2. Steve Turner

Complaint paragraph 11 alleges that about March 1991 TAF, acting through Supervisor Steve Turner, promised employees insurance and higher wages if they remained with TAF in the event TAF did not sign another contract with the Union, and impliedly promised that TAF would institute a profit-sharing plan in such circumstances. Phillip Alan Thames testified in support of these allegations.

Philip Alan Thames has worked for TAF about 7 years, although he left it in August 1991 and returned about June 1992. (1:41–41, 47, 52.) Thames works for the Company as an apprentice fitter. (1:42.) Thames describes a late March conversation in Supervisor Steve Turner's vehicle as they drove back to the shop from a job at a local bank. Turner, Thames testified, said that if the Company did not sign a union contract that Thames would still have a job at $14 an hour and still have insurance. Moreover, Turner added that the Company would institute either a pension or profit-sharing plan. (1:44–45.) Steve Turner did not testify.

3. Conclusions

Crediting the Government's witnesses, I find that, as alleged, TAF violated Section 8(a)(5) and (1) of the Act when it bypassed the Union and dealt directly with bargaining unit employees.

E. *Unilateral Changes*

1. Applicable law

When a collective-bargaining agreement (CBA) expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Laborers Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 fn. 6 (1988); *NLRB v. Katz*, 369 U.S. 736 (1962); *Mount Hope Trucking Co.*, 313 NLRB 262 (23, 1993); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

The rights of parties in a collective-bargaining relationship differ depending on whether the parties are in a nonnegotiation setting or whether they are engaged in bargaining. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993). As the Board wrote in *Bottom Line Enterprises*, id. at 374 (footnotes omitted; emphasis added):

> Absent exceptional circumstances, an employer may not justify a unilateral implementation of a proposal on a particular subject, submitted during negotiations for a labor agreement to succeed an expired one, on the ground of a union's failure to request bargaining on that subject. When negotiations are not in progress, we can find a waiver of a union's statutory right to bargain over a change in the unit employees' terms and conditions of employment on the basis of the union's failure to request bargaining if the union had clear and unequivocal notice of the proposed change and was given that notice sufficiently in advance of implementation to permit meaningful bargaining. However, when, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation *at all*, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. The Board has recognized two limited exceptions to this general rule: ''[w]hen a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining,'' and when economic exigencies compel prompt action. Such extenuating circumstances are not, however, present in this case.

Where, as here, a CBA has expired and the employer makes unilateral changes during negotiations for a successor CBA, the employer has the burden of demonstrating that the exceptions (impasse, delay by union, or economic emergency) apply. *North Star Steel Co.*, 305 NLRB 45 (1991); *Control Services*, 303 NLRB 481, 483 fn. 12 (1991), enfd. mem. 140 LRRM 2248, 141 LRRM 2208 (3d Cir. 1992); *Roman Iron Works*, 282 NLRB 725, 731 (1987), enf. denied on other grounds 856 F.2d 1 (2d Cir. 1988).

2. Changes implemented April 22, 1991

The parties held their first bargaining session on April 9, 1991. As for most of the meetings, notes of the Union (G.C. Exh. 25) and TAF (R. Exh. 102) are in evidence. Representative Ronnie L. Phillips served as the Union's chief negotiator. (2:310.) Alton Turner was TAF's chief negotiator at the first meeting, with Attorney Deborah H. Kehoe, then an associate of Attorney Willis C. Darby Jr., assuming that role thereafter. (2:271; 7:1228.) Beginning about 10 a.m., and allowing for breaks and lunch, the meeting lasted until about 4:20 p.m. The parties proceeded on the basis of discussing TAF's proposed contract section by section, although they did not complete their discussion of all sections.

During the meeting TAF submitted a list of 23 jobs (G.C. Exh. 12:3) on which it had bid but lost between April 24, 1990, and March 12, 1991, when TAF's bids were based on union wages and benefit cost levels. (2:439; 6:1096–1097, 1141–1142). The notes of neither Phillips (G.C. Exh. 25 at 7) nor Kehoe (R. Exh. 102 at 6) reflect any discussion of the topic. Turner testified that he told Phillips the lost jobs reflected why TAF was having a problem being competitive. Turner does not recall Phillips' response other than Phillips showed no interest. (6:1097, 1141–1142.) Nothing in the evidence indicates that Turner said that TAF was suffering an economic emergency or otherwise needed immediate economic relief in order to survive. As Attorney Darby argued at trial, TAF had work, but it was losing work it should have been getting; TAF was not broke, but it was not competitive; TAF ''delivered to the Union evidence that showed that we were trying to be competitive, and we were not competitive because of the rates.'' (6:1151–1152.) Of course, operating at a competitive disadvantage does not necessarily equate to

an economic emergency which would justify unilateral changes in wages, hours, or working conditions.

During the course of the first meeting Phillips submitted written counterproposals on articles 3, 4, and 25 pertaining to recognition, union security, and grievance procedure and arbitration. (G.C. Exh. 24.) As the parties proceeded through the meeting, using TAF's proposed contract (G.C. Exh. 8) as a basis for discussion, they tentatively approved one or two provisions, left most open for further discussion (with Phillips saying the Union would submit counterproposals as to several provisions), and apparently never read the last two articles pertaining to a zipper clause (complete agreement) and the contract term. The parties agreed to meet again on April 30. Turner suggested the date. (7:1241; G.C. Exh. 25 at 9; R. Exh. 102 at 10.)

Two days later, on April 11, Turner mailed to the Union a proposed drug abuse policy and certain payroll data the Union had requested. (G.C. Exh. 11.) That was followed the next day by a letter, dated April 12, from Turner to Phillips, the text of which reads (G.C. Exh. 12):

> On Tuesday, April 9, 1991, Triple A Fire Protection, Inc. presented you with a list of ''Jobs Bidded, Not Awarded,'' a copy of which is enclosed for your convenience. Triple A Fire Protection, Inc. is continuing to bid on jobs in Alabama, Florida and Mississippi. Triple A Fire Protection, Inc. continues to bid against competitors who have a lower labor cost and who have no restrictions on prefabricated material or sub-contracting.
>
> Although Road Sprinklers Local 669 gave notice of an intent to terminate our old agreement on December 14, 1990 and express[ed] an intent to reach an agreement before March 31, 1991, Road Sprinkler Local 669 has not submitted a meaningful proposal to Triple A Fire Protection, Inc. nor seriously addressed the March 21, 1991 proposal of Triple A Fire Protection, Inc. We can no longer tolerate your inaction or losing a majority of the jobs we bid.
>
> On Monday, April 22, 1991, Triple A Fire Protection, Inc. intends to effect the proposal [G.C. Exh. 8] submitted to Road Sprinkler Fitters Local Union No. 669 [G.C. Exh. 7] by letter dated March 21, 1991 unless an agreement is reached between Triple A Fire Protection, Inc. and Road Sprinkler Fitters Local Union No. 669 before Monday, April 22, 1991.
>
> Representatives of Triple A Fire Protection, Inc. are available to meet with representatives of Road Sprinkler Fitters Local Union No. 669 in an attempt to reach a mutually satisfactory agreement prior to April 22, 1991.
>
> In the event no agreement is reached with Road Sprinkler Fitters Local Union No. 669, all employees of Triple A Fire Protection, Inc. should report to their usual jobs ready to work on Monday, April 22, 1991 under the terms and conditions contained in our proposal of March 21, 1991.

Turner admits that, as best he remembers, neither he nor Kehoe said anything at the April 9 meeting of an intent to implement on April 22 TAF's proposed contract (G.C. Exh. 8) should the parties not reach a successor CBA before that date. (6:1140.) No mention of such a possibility appears in the notes (G.C. Exh. 25; R. Exh. 102) of either party. Kehoe confirms that neither she nor Turner mentioned it at the April 9 meeting. (7:1222.) According to Turner (supposedly less than positive, ''I would think,'' about this significant point) he decided after the April 9 meeting to implement TAF's March 21 proposed contract on April 22. (6:1165.) Similarly less than positive, Kehoe believes the decision to implement came after the April 9 meeting. (7:1232.)

As for what triggered TAF's implementation decision, and the decision not to wait and discuss the matter with the Union at the second bargaining session on the agreed date of April 30, Turner testified that he was losing money and ''nobody seemed interested in my problem.'' (6:1166.) Despite the important nature of TAF's asserted problem, Turner sent the April 12 implementation notice by certified mail without a contemporaneous copy by fax, yet many, perhaps most, of their communications were by fax. (6:1167.) Turner did not telephone Phillips because (1) he really does not know why; (2) because previous calls to Phillips might take 2 or 3 days to reach him; and (3) because Turner was not in the habit, in their 15-year relationship, of telephoning Phillips. (6:1167–1168.) Respecting the no-habit testimony, Turner apparently forgot about his many telephone calls to Phillips and to the Union which Turner tape recorded.

Phillips received TAF's implementation notice on April 16. (3:508.) He did not respond specifically to TAF's notice. (2:440; 3:508.) Phillips sent no specific response because he feared that Turner was trying to ''set me up'' for something which Phillips did not understand in view of the meeting already scheduled for April 30 (3:508), although earlier Phillips testified (2:440) that he ''pretty much'' understood the language of the implementation notice. Moreover, he saw no reason to change the date set for the April 30 meeting. (2:440.) On April 17 Phillips wrote (C.P. Exh. 6) Turner reaffirming the April 30 date and designating the hour and place. (2:441.)

By letter (R. Exh. 106) dated April 26, Turner wrote Phillips (who sent no response) as follows (6:1101–1105):

> Enclosed herewith is a letter dated April 16, 1991 from Billy G. Williams, Chief Estimator, JESCO, relating to the Greil Memorial Hospital.
>
> You will notice that Triple A Fire Protection, Inc. came in second between two open shop contractors, Brendle Sprinkler Company, who was first, and Fire Protection Engineering & Supply who was third.
>
> Triple A Fire Protection, Inc. cannot effectively compete with open shop contractors in this area with the labor cost that existed in the collective bargaining agreement which expired March 31, 1991.
>
> We are still awaiting a proposal from Sprinkler Fitters 669. We trust that Sprinkler Fitters 669's proposal will address the competitive position of Triple A Fire Protection, Inc.

At the second bargaining meeting, held April 30, the Union's chief negotiator was Billy B. Littleton, a business agent from Texas (2:316, 462), substituting for Phillips who had to be elsewhere on the Union's business. (2:316; 5:819.) Allowing for breaks and lunch, the meeting lasted from 10 a.m. to about 2:45 p.m. when Littleton left to catch his return flight. (2:483; R. Exhs. 8, 108.) Littleton concedes that Kehoe said TAF was prepared to bargain around the clock

until the parties reached a successor CBA. (2:469.) Littleton told Kehoe that he was not prepared to negotiate for more than that day. (2:469–470.) Although the parties discussed several articles that day, it seems clear that more progress could have been made had the meeting been longer and had Phillips been present. Littleton acknowledges that he had only read TAF's proposed contract and had not studied it thoroughly, and had told Kehoe essentially that at the meeting. (2:464, 470.)

During this second meeting the subject of TAF's implementation notice arose. Kehoe said that TAF had implemented its March 21 proposed contract on April 22. Littleton objected, saying that just because TAF had proposed a contract did not give it the right to put it into effect. Kehoe said that TAF's position is the former CBA had expired and that TAF did have the right to implement its proposed contract and that it had properly notified the Union of its intent to implement its proposed contract. Littleton replied that the Union and TAF have a 9(a) relationship and that TAF is required to bargain with the Union on the terms and conditions of the expired CBA until the parties reach either a new agreement or an impasse. Kehoe responded that TAF had implemented its (March 21) proposed contract on April 22. (2:464, 469, 484–494; R. Exh. 8.)

Kehoe asserts that Littleton simply stated, on two or three occasions, that TAF was bound by the contract between the Union and the National Fire Sprinklers Association. (7:1199, 1216–1217.) Even so, on cross-examination by the Union, Kehoe acknowledges that Littleton objected to TAF's implementation of the proposed CBA and said that implementation would be an unfair labor practice. (7:1237.) Kehoe's notes confirm the reference to an unfair labor practice and that the Union would file a charge. (R. Exh. 108 at 3.) According to Kehoe's notes, at the meeting TAF's position was that it would agree that any successor CBA would be retroactive to April 22. (R. Exh. 108 at 3.) Kehoe testified that the Union did not ask that TAF postpone implementing its March 21 proposed contract. (7:1199.) (Presumably TAF meant the question and answer to be that the Union did not ask TAF to rescind the April 22 implementation and then postpone reimplementing its March 21 proposed contract.) To the extent Littleton and Kehoe differ, I credit Littleton.

Implementation actually was not unitwide, for Turner testified that TAF did not apply the new (and lower) wage rates to individuals on the payroll before the CBA expired. (6:1129, 1168.) The record reflects that TAF hired new employees in May under TAF's implemented proposal. (2:286–287.) As TAF's trial attorney, Willis Darby, expressed it at trial, ''these were the first employees we hired under those circumstances.'' (2:283.) Turner confirms, for example, that Joey Lawshe (hired May 7 at $11 per hour) was hired and worked as a sprinkler fitter employee. (2:273, 276.) There is no showing that Lawshe's $11 per hour, which apparently fell within the general range of apprentice pay under the expired CBA, was different from what he would have been paid under the expired CBA. Nevertheless, any question is satisfied by TAF's answer to the complaint and by Attorney Darby's admission that TAF in fact did hire employees ''at rates other than those in the past agreement. . . . There's no dispute. We told the Labor Board that a long time ago. No dispute whatsoever. . . . I'm telling you we did it.'' (2:281.) Phillips testified that TAF's March 21 proposed contract would (if implemented) have effected substantial reductions. (5:876.)

Complaint paragraph 13 alleges that since about April 20, 1991, TAF has changed the wage rates of employees covered by the expired CBA. In its October 8, 1991 answer TAF states:

> Triple A denies the averments of paragraph 13 of the complaint, except Triple A admits that pursuant to prior notice to the Union all employees employed by Triple A after April 21, 1991 have been employed in classifications that were not specifically named in the expired 8(f) prehire agreement at wage rates that were not specifically established by the expired 8(f) prehire agreement; none of the wage rates of employees who were employed prior to the expiration of the 8(f) prehire agreement have been changed.

Respecting fringe-benefit payments, Turner admits (6:1168) that as of April 22, 1991, TAF ceased making payments to the health, welfare, and pension funds. Complaint paragraph 12 alleges that since about April 20, 1991, TAF has ceased making the fringe-benefit payments required by the expired CBA. TAF's October 8, 1991 answer asserts:

> Triple A denies the averments of paragraph 12 of the complaint, except Triple A admits that pursuant to prior notice to the Union all employees employed by Triple A after April 21, 1991 have been employed in classifications that were not specifically named in the expired 8(f) prehire agreement at wage rates that were not specifically established by the expired 8(f) prehire agreement; none of the wage rates of employees who were employed prior to the expiration of the 8(f) prehire agreement have been changed.

In view of this evidence, the General Counsel prima facie has established that TAF's unilateral changes are, as alleged, violative of Section 8(a)(5) of the Act. I turn now to TAF's defenses.

### F. *TAF's Defenses*

#### 1. Introduction

TAF advances several defenses, in addition to its 8(f) contention, either in its answer (no uncoerced majority; refusal to bargain; waiver) or at the hearing (impasse). The Board's October 19, 1993 order remanding, *Triple A Fire Protection*, 312 NLRB 1088 (1993), rejected the 8(f) contention and the defense of no uncoerced majority as being untimely raised. TAF again advances these defenses, presumably as a precaution deemed necessary to preserve its position for any appeal. Contrary to TAF's position at trial (5:778–779), Section 10(b) of the Act applies to TAF's affirmative defenses. *NLRB v. Viola Industries*, 979 F.2d 1384, 1387 (10th Cir. 1992) (defense of coercion); *Brower's Moving & Storage*, 297 NLRB 207, 209 fn. 11 (1989), enfd. mem. 914 F.2d 239 (2d Cir. 1990) (majority status); *Morse Shoe*, 231 NLRB 13 (1977), enfd. 591 F.2d 542 (9th Cir. 1979) (majority status). Accordingly, I shall not now address the untimely and Board-rejected defenses of 8(f) and majority status.

As mentioned, TAF advances the affirmative defenses of impasse and no intent by the Union to enter into a CBA. The

General Counsel and the Union objected to the relevance of anything beyond the April 22, 1991 date of the unilateral changes. (2:343; 3:589–593.) TAF offered the evidence for all purposes. (3:597.) Although initially I ruled that TAF could offer such evidence during its case in chief (2:343, 411), I subsequently (3:597) modified the ruling so as to limit receipt of the evidence to the issue of remedy, based on *Dependable Maintenance Co.*, 276 NLRB 27 (1985). Citing later decisions by the Board, the General Counsel argues that a limited remedy is unwarranted because TAF never bargained to a good-faith impasse, and the Union argues (Supp. Br. at 8–10) that Dependable Maintenance is inapposite.

Finding *Dependable Maintenance* controlling, I shall review the post-April 22, 1991 meetings, and all the record evidence (other than the rejected evidence), for the purpose of determining whether the parties bargained to a good-faith impasse at some point after TAF's unilateral changes of April 22, 1991. Events after April 22 are not relevant to whether any unlawful unilateral changes were implemented on April 22.

2. Waiver

Referring initially to the first bargaining session of April 9, 1991, TAF contends that the Union waived any complaint it had about the changes implemented on April 22 because the Union failed (at the April 9 meeting) to request TAF to bargain about them after receiving notice of the intent to implement them by TAF's letter of ''March 26.'' (Supp. Br. at 22, 58). TAF has confused the March 26 notice (G.C. Exh. 9) about intended payment to any strike replacements (no strike occurred in April) with TAF's April 12 letter (G.C. Exh. 12, quoted earlier), sent after the April 9 meeting, in which Turner advised Phillips that TAF's proposed contract of March 21 would be implemented on Monday, April 22, unless a new CBA was reached beforehand. As noted earlier, Phillips did not respond to TAF's notice of implementation. Also as already described, at the second bargaining session, held April 30, Littleton objected when Kehoe said that the March 21 proposed contract had been implemented on April 22. Littleton said the parties had a 9(a) relationship, that TAF was required to bargain over terms of the expired CBA until a new agreement or impasse was reached, and that any implementation would be an unfair labor practice over which the Union would file a charge. I find TAF's waiver defense to have no merit. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

3. Impasse on or before April 22, 1991

a. *Legal test*

A bargaining impasse occurs when good-faith negotiations have exhausted the prospects of reaching an agreement. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). Further, id:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Adopting quoted language, the Supreme Court wrote in *Laborers Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 fn. 5 (1988):

> Given the many factors commonly itemized by the Board and the courts in impasse cases, perhaps all that can be said with confidence is that an impasse is a ''state of facts in which the parties, despite the best of faith, are simply deadlocked.''

The Supreme Court's quote of ''simply deadlocked'' comes from Gorman, *Labor Law* 448 (1976), which in turn quotes the language from *NLRB v. Tex-Tan*, 318 F.2d 472, 482 (5th Cir. 1963). Recall that (contrary to TAF's position, 2:357) impasse is a defense, and the party asserting that defense has the affirmative burden of establishing impasse. *North Star Steel Co.*, 305 NLRB 45 (1991); *Control Services*, 303 NLRB 481, 483 fn. 12 (1991), enfd. mem. 140 LRRM 2248, 141 LRRM 2208 (3d Cir. 1992); *Roman Iron Works*, 282 NLRB 725, 731 (1987), enf. denied on other grounds 856 F.2d 1 (2d Cir. 1988).

b. *No impasse existed*

Arguing impasse, TAF lists several asserted indicia, most of which are events which predate the first bargaining session of April 9, 1991. TAF does not contend that the April 9 bargaining itself was exhausted on any issue. As the first session merely saw the parties making an initial reading, with preliminary discussion, of TAF's proposed contract, it is clear, and I find, that no bargaining deadlock had occurred on any issue, much less on any issue which blocked negotiations generally. Bargaining had just begun. Discussion had been exhausted on nothing. There was no bargaining impasse when the unilateral changes were implemented on April 22, 1991.

4. Bad faith of the Union

a. *Introduction*

What TAF really seems to be arguing (and does argue in many respects) is that an impasse existed from the first day of April 1 (1:40; 2:341, 356, 370; 3:626; 5:766; Br. at 95, 98; Supp. Br. at 42) because the Union came to the bargaining table on April 9 with (1) the fixed intent to obtain only a CBA which adopted or mirrored the national agreement (1:35, 39–40; 2:369; 5:766, 769; 6:1035) and (2) to achieve this goal, submitted its own proposals piecemeal (Br. at 70, 72, 96; Supp. Br. at 44, 46 fn. 35, 56).

b. *Piecemeal bargaining*

Although TAF fails to cite cases or articulate the vice of piecemeal bargaining, the Board finds such a tactic indicative of bad-faith bargaining because it frustrates the bargaining process. *E. I. Dupont & Co.*, 304 NLRB 792 fn. 1 (1991); *Sacramento Union*, 291 NLRB 552, 556 (1988). Citing *Rockingham Machine-Lunex Co.*, 255 NLRB 89 fn. 2 (1981), the General Counsel and the Union assert that the Union's failure to provide all of its proposals sooner was merely reflective of a format of bargaining from TAF's proposed contract, and such a format is not violative of the Act. *Rockingham*, however, apparently involved an agreed format. Although TAF did not refuse to bargain in protest, it frequently re-

quested a complete proposed contract from the Union. Not until the end of the last bargaining session did the Union comply, or substantially comply, with that request. I therefore find that the parties were not bargaining from TAF's proposed contract as some agreed format.

Nevertheless, I find no merit to the piecemeal-bargaining defense because there was only a single meeting before the unilateral changes. Evidence about the subsequent meetings was received on the limited basis of its relevance to any remedy. (3:597.)

c. *National contract only*

TAF's theory of bad faith by the Union is that the Union, in its secret desire to obtain a mirror image of the national contract, came to the bargaining table with the intent to prolong negotiations and, by time consuming and expensive negotiations, grind TAF into the dust of poverty. (5:766, 840–842.) So squeezed by the adverse economics imposed by the Union's tactics, TAF eventually would be forced to capitulate or to go out of business.

Aside from remarks during settlement discussions (offer-of-proof evidence rejected by me at trial, 5:773, 779, 784, 792, 840–842; 6:943, 1024; R. Exh. 76 at 13, 26; R. Exh. 228; C.P. Exh. 8), there is some testimony by Phillip A. Thames which possibly can be interpreted as supporting TAF's theory. Thames was working for TAF during the spring of 1991. Several days after April 1, apparently during April 1991, Thames attended a union meeting at which Phillips spoke. At the meeting Phillips told TAF's employees that TAF was not going to sign the agreement (presumably the interim national agreement), but for the employees to remain working at TAF until told otherwise. Phillips said that would keep ''everything in court,'' and would ''keep negotiations going.'' And as long as negotiations were in progress, Phillips told them, ''Triple A would have to spend money.'' The longer they negotiated, Phillips added, ''the more money Triple A would have to spend in court.'' (6:994–996.)

In rebuttal, Phillips testified that he met with the employees (several times, apparently) to keep them abreast of matters. He informed them (sometime around May 1, apparently) that he did not know how long the independent negotiations with TAF would take, and that he wanted them to stay on the job as long as possible because the Union was there to get a contract, to reach impasse, or strike, or whatever. The Union would be there ''for however long it took.'' Denying that there was any reference to costs in dollar amount, Phillips asserts that he told the employees the process would be expensive for both the Union and for TAF. (7:1165–1167.) At no point in his rebuttal testimony does Phillips address the specific issue of whether he stressed to the employees that the longer negotiations took the more money TAF would have to spend.

Thames was a credible witness. Although he does not report how or whether Phillips explained the reference to ''court,'' the discrepancy is immaterial. I am persuaded, and find, that Phillips told the employees that their remaining on the job would keep the negotiations in progress, and that as long as negotiations were in progress TAF would have to spend money. Despite this finding, such a statement is a bit ambiguous. It can be interpreted two ways. First, it is nothing more than Phillips' observing that solidarity by the employees' remaining on the job combined with the expense to TAF to negotiate would apply economic pressure to TAF and persuade TAF to agree to a CBA favorable to the employees. Nothing is unlawful with such a tactic. Second, the statement can be interpreted as implying that the Union wanted to break TAF financially unless, possibly, TAF satisfied some demand of the Union. This interpretation is a stretch. Of the two, the first interpretation is less complicated and more natural. I find that it represents the message Phillips sought to convey. Hence, no unlawful motive or object is reflected in Phillips' remarks, as quoted by Thames, or in the message I have found Phillips expressed that day.

d. *Conclusion*

In light of these findings, I now find without merit TAF's defense that the Union, before April 22, 1991, bargained in bad faith and with no intention of entering into a CBA other than one which mirrored the national CBA. As of April 22 the evidence falls far short of showing any such intention on the part of the Union.

5. Economic emergency

As I summarized earlier, at the April 9 meeting Turner submitted to the Union a list of 23 jobs on which TAF assertedly had bid, but lost, between late April 1990 and mid-March 1991. Turner testified that he told Phillips that TAF was having a problem being competitive. Statements at the hearing by Attorney Darby are to the same effect. Over objections to relevance, TAF introduced copies of its Federal income tax returns for 1990 (R. Exh. 235) and 1991 (R. Exh. 236) for the dual purpose of (1) substantiating its bargaining position of being at a competitive disadvantage and (2) respecting any remedy. (7:1259–1263), 1274–1278.) Turner did not prepare them and could give practically no information about the financial details. (7:1269–1272.) The 1990 return shows a profit and the 1991 return shows a loss. The 1990 return was not submitted to the Union at the April 9 bargaining session (and perhaps had not yet been filed), and the 1991 return was still a year in the future as of April 9, 1991. Thus, the objections to relevance should have been sustained respecting the merits. To the extent the returns bear on any remedy, they are in evidence.

In any event, the law is well settled that economic necessity does not authorize an employer to make unilateral changes at midterm of a collective-bargaining agreement (CBA). *Stevens & Associates Construction Co.*, 307 NLRB 1403 (1992). As earlier noted, the parties must maintain the status quo during negotiations for a renewal agreement. During contract negotiations an employer may avoid having to open its financial records if its position is one of competitive disadvantage rather than an inability to pay the Union's economic demands. *Beverly Enterprises*, 310 NLRB 222, 226–227 (1993), citing *Nielsen Lithographing*, 305 NLRB 697 (1991). Thus, it appears that the position which TAF expressed on April 9 fell short even of requiring it to open its financial books. And whatever dire financial emergency would have to exist to justify unilateral changes under the law, it is clear that TAF failed to show such here. Accordingly, I find TAF's economic emergency defense to be without merit.

G. *Events After April 22, 1991*

1. Description

As I have noted, evidence of events after the April 22, 1991 unilateral changes was restricted to whatever bearing it would have on any remedy. (3:597.) Aside from two aborted meetings, May 21, 1991, and January 14, 1992, on which TAF focuses, testimony about other meetings is limited, with the parties relying principally on the summaries or notes the representatives prepared. At this point I note that TAF, blaming the Union for walking out before there could be meetings on May 21, 1991, and January 14, 1992, never articulates the significance of these events. Presumably TAF contends it shows that the Union was not really interested in reaching an agreement and was engaging in delay as a tactic in order to force TAF to sign a mirror image of the national contract. However, I find that the missed meetings are largely immaterial in light of the meetings which followed. The question is whether the parties bargained to impasse after April 22, 1991. I find the answer to be no.

Much earlier in this decision I listed the dates of the 10 actual bargaining sessions, plus the dates of 3 sessions which failed to occur as scheduled because one of the parties arrived late. Beginning with the second meeting on April 30, 1991, and extending to the 10th bargaining session on July 16, 1992, it is clear that the parties freely discussed contract articles. The meetings generally lasted several hours, beginning about 10 a.m. and ending usually about 3 p.m., with a break for lunch. At different times the Union submitted one or more individual articles as part of its overall proposal. Not until the end of the last meeting, however, did the Union submit what apparently comprised the balance of its overall proposed contract.

If there is one theme which runs through all these months, it is TAF's constant effort to obtain from the Union a complete proposed contract so that bargaining would not be piecemeal. By oral request and by letter, on many occasions, TAF so requested. The Union generally ignored such requests, or said it would propose as it saw fit, until near the end. A secondary impression also is created by the evidence. It is that conduct and statements by TAF and the Union during the negotiations suggest that neither party was all that concerned with the time that had elapsed since bargaining began on April 9, 1991, yet the parties apparently are not close to a new contract.

The meeting scheduled for May 21 at 10 a.m. at the Bradbury Inn was not held. It appears that the union representatives were on time but TAF's representatives were late. The desk clerk, Elizabeth A. Isbell, informed the union representatives that TAF had called and would be just a few minutes late. This was about 9:53 a.m. At the request of the union representatives (Phillips and Radecker), Isbell made a note (R. Exh. 134) advising TAF that the Union had been present and would send a letter. At 10:05 a.m. TAF's representatives appeared at the desk. (R. Exh. 134a; 5:755, 759–761.) Phillips denies that a motel clerk gave him such a message. (5:829.) I do not believe Phillips on this, and I find Isbell a credible witness. Although Isbell did not identify Phillips as the person she told, I find that it was Phillips. There also is credible evidence that the parties actually saw one another in the parking lot as the Union was leaving and TAF arriving, yet Phillips and Radecker did not turn back. By fax later that day the parties agreed to meet the following day at 10 a.m. at the Days Inn motel. (R. Exh. 133.)

The parties sent each other letters protesting the aborted meeting of May 21, with Turner's May 21 letter (R. Exh. 132) covering more details and Phillips' (R. Exh. 135) accusing Turner of being rude for failing to show. Although I find it immaterial to the result, I find that the Union left the motel with notice that TAF was on the way and that in the parking lot the Union saw TAF's representatives arriving but departed anyway.

The following day, May 22, the parties held their third meeting from about 10 a.m. to about 3 or 3:30 p.m. At the beginning of the meeting Kehoe asked if the Union had brought any written proposals. Phillips said that the Union was there to negotiate. Phillips testified that it was not his manner of bargaining to submit a complete proposed contract at the first meeting (2:344) (and presumably not at any early meeting). During the meeting the parties, progressing through TAF's proposed contract, discussed several articles, reaching tentative agreement on some sections. During the meeting the Union submitted its proposals for articles 10 (inspection), 18 (jurisdiction of work), and 17 (working within jurisdiction of other sprinkler unions).

In correspondence before the fourth meeting, TAF again requested, by letter dated May 30 (R. Exh. 141), ''a complete proposal from'' the Union. Phillips' reply of June 5 (R. Exh. 142) addressed a date for the next meeting, but not the matter of a complete proposed contract, and Turner noted this is his responding letter (R. Exh. 144) of June 6.

The fourth meeting was held June 25. The notes (G.C. Exh. 35; R. Exh. 152) reflect that the meeting lasted from shortly after 10 a.m. (Turner arrived about 10 minutes late) until around either 4 or 5 p.m. Littleton substituted for Phillips, with Clarence Radecker assisting. The parties devoted most of their time to discussing articles 2 (leave of absence), 3 (union representatives and stewards), 4 (grievances), and the Union's 10, 17, and 18.

The parties met the following day, June 26, for their fifth session. Notes by Kehoe are in evidence. (R. Exh. 154.) Littleton again substituted for Phillips. Discussion again covered several hours and centered on articles 3 and 4. Toward the end of the meeting Kehoe states that TAF is prepared to accept the Union's proposed grievance steps 1, 2, and 3 if the Union agrees to TAF's article 4, section 7, provided the Union removes the reference to the National Fire Sprinkler Association (NFSA). Littleton, as Kehoe's notes record (R. Exh. 154 at 10), replied that removal of the reference to NFSA already had been agreed to. Littleton's reference echoes his testimony (2:463, 471–472) that at the second meeting, April 30, he had assured TAF that the Union was willing to strike references to NFSA so that the CBA would be between the Union and TAF.

Before the sixth meeting on August 28, TAF, responding to a grievance letter from the Union, wrote Phillips, by letter dated July 19 (R. Exh. 157):

> I trust that you realize that it is virtually impossible for us to reach an agreement with Local 669 when after three and one-half months Local 669 has not made its full requirements for a new agreement known.
>
> Your proposed meeting during the week of August 19, 1991 may be the last, unless and until Local 669

> evidences an intention to negotiate a new agreement by submitting a complete proposal; i.e., the requirement of Local 669 for an agreement.

Letters by Turner in August repeated his request, without success. (R. Exhs. 163–165.) Advising the Union of the location for the August 28 meeting, TAF, by letter faxed on August 20, wrote (R. Exh. 167):

> Once again we urge you to submit the counter proposal of Local No. 669 to the complete proposal of Triple A submitted to you by letter dated March 21, 1991.

In his August 20 letter Turner also said that TAF would be prepared to discuss TAF's rule about drinking on the job.

Phillips, assisted by Clarence Radecker, again represented the Union at the August 28 meeting, with Kehoe and Turner present for TAF. Most of the meeting was consumed with a discussion about TAF's rule about drinking. Around 2 p.m. Kehoe presented the Union with TAF's proposal for a new policy regarding drugs and asked if the Union had a proposal for such. Phillips said that the Union did have a drug policy which ''I shall present to you when we feel it is appropriate.'' (G.C. Exh. 38 at 3, Phillips' own notes; R. Exh. 170 at 6.) Although Kehoe wanted to discuss the drug policy, Phillips declared the meeting ended for that day. (R. Exh. 170 at 7.)

By letters faxed after the meeting the parties were unable to agree to meet the next day. A brief strike at this time was resolved. On September 19 and 20 the parties exchanged letters (R. Exhs. 178, 179) concerning the next meeting date, with October 8 one of the dates. By letter dated September 30 (R. Exh. 181), Joseph G. Norton, the Acting Regional Director for NLRB Region 15, notified the Union that certain of its charged allegations in the instant case had either been withdrawn with the Region's approval or dismissed, but that such action did not affect the outstanding (September 27) complaint allegations.

Although the parties gathered for their scheduled meeting on October 8, the meeting did not commence because Turner had to leave after a few minutes to see his dentist concerning a tooth Turner had broken the evening before. Kehoe said she could not meet without Turner being present. They decided to resume at 2 p.m. that day. About 1:55 p.m. Kehoe reached Phillips at his motel room and explained that Turner had mistakenly thought his appointment was for 10:45 a.m. when in fact it was for 1:30 p.m. and that she did not know where he was. She asked Phillips to wait in his room for her to call back. Phillips declined to do so, saying that he would be in contact for a future meeting. (7:1361–1363, 1382; G.C. Exh. 39; R. Exh. 183.) An exchange of letters followed with Phillips, on October 11 (R. Exh. 184), expressing dismay and suggesting that TAF had intended to stall the negotiations by having Kehoe not continue in Turner's absence, assisted by someone else from TAF. Phillips also said that the Union's representatives arrived with ''numerous proposals and counterproposals, including economic proposals, to offer Triple A, and were looking forward to a productive good faith bargaining session.'' Turner's October 15 reply (R. Exh. 186) rejects the Union's accusations, offers his explanation of the events, apologizes for the delay his ''dental emergency'' caused, lists dates, and concludes by asking for copies of the Union's numerous proposals.

The seventh actual bargaining session was held November 25, the last meeting in 1991. The regular four representatives were present, with the meeting lasting from about 10:30 a.m. to about 3 p.m., with lunch from about 12 noon to about 1:30 p.m. Before the meeting actually began the Union gave TAF the Union's proposed article on a drug policy, article 41. TAF's drug proposal was discussed at some length. Union access to the job and the job steward's duties under article 3 also were discussed before lunch. Just before lunch Phillips tendered a copy of the Union's article 45 (number and location of projects). After lunch the parties discussed an earlier request by TAF for copies of other agreements, then they resumed on the drug policy. Random testing and searches also were discussed, as were over-the-counter drugs. The parties briefly discussed helpers and job training. Toward the end of the meeting the Union tendered its proposed articles 8 (extra contract agreements), 19 (welfare fund), 34 (materials and equipment fabrication), 42 (process of assembling), 45 (number and location of projects), and 48 (management rights). (G.C. Exh. 36; R. Exh. 192.)

The next meeting was scheduled for January 14, 1992. By a six-page letter to Phillips dated January 10 (R. Exh. 194), Turner requests the Union to furnish numerous items for the bargaining session. Much of this relates to whether credit was given to TAF's employees covered by the welfare fund and to a settlement the parties had reached earlier. However, Turner goes into this topic by observing that the Union's article 19 (welfare fund), proposed at the last meeting, specified a first-year payment of $3.15 per hour to the National Automatic Sprinkler Industry (NASI) welfare fund.

Another testy dispute prevented the parties from meeting on January 14. Phillips, Radecker, and a third representative (E. M. Hays) were present for the Union. Phillips testified, and his notes (G.C. Exh. 40) reflect, that Turner was present but (about 9:55 a.m.) said he did not know where Kehoe was and suggested they could do nothing without her except schedule the next meeting. Turner supplied certain drug documents. According to Phillips' notes, the parties left at 10:20 a.m. when Kehoe never arrived. (7:1364–1365.) The notes, and Phillips' testimony, do not describe what occurred between about 10 and 10:20 a.m.

TAF's version is different. Turner testified he told Phillips that Kehoe was on her way but had been delayed because a printer was malfunctioning in producing data the Union had requested. Turner supplied TAF's (revised) drug policy to Phillips. Phillips left a few minutes later. Within 8 to 10 minutes, shortly after 10 a.m., Kehoe arrived. (7:1256–1258, 1273–1274.) Turner's postmeeting account, his letter of January 17 to Phillips, puts the Union's departure at 10:02 a.m. and Kehoe's arrival at 10:08 a.m. (R. Exh. 197.) Kehoe concedes she was late for the meeting. (7:1225.) I credit TAF's version.

In his January 17 letter, Turner forwarded to Phillips the contract sections which Kehoe had brought for delivery to the Union 3 days earlier. Turner then describes the proposals, which pertain to medical insurance which, in the absence of agreement, will be placed into effect February 1, 1992. Turner also states that TAF was prepared to accept the Union's articles 8, 42 in substance, and 45. Turner again requests copies of the Union's other CBAs. By his letter of January 31 (R. Exh. 200a) to Turner, Simpson forwarded a copy of the welfare trust agreement. He declined to furnish copies of

contracts with other employers as being irrelevant, pertaining more, apparently, to a fishing expedition by TAF ''in support of your baseless unfair labor practice charges.''

On February 18, 1992, the eighth actual bargaining session was held. It was the first of the three meetings conducted in 1992. Phillips and E. M. ''Mike'' Hays represented the Union, with Kehoe and Turner present for TAF. The meeting began about 10 a.m. and extended beyond 3:30 p.m. with an allowance for lunch. (G.C. Exh. 41; R. Exh. 203.) The parties discussed a variety of the contractual articles. The Union's notes (G.C. Exh. 41) for the meeting take 11 pages and Kehoe's notes (R. Exh. 203) extend to 18 typed pages. Although all was not sweetness and light at the meeting, it is clear that, overall, progress was made. As the meeting concluded, Phillips handed TAF the Union's proposals for wages, article 7, and job foremen, article 9. (G.C. Exh. 41 at 11; R. Exh. 203 at 18; R. Exh. 9 at k.) Phillips acknowledges that the Union's proposed wage rates are higher than those in the national contract, explains that he pegged them at that level for bargaining purposes, and asserts that he was flexible on the levels. (5:881–882.)

The penultimate meeting, the ninth actual session, was held March 17, 1992. Phillips and David Lewis represented the Union, with Kehoe and Turner present for TAF. The meeting began about 10 a.m. and extended beyond 2:30 p.m. (Kehoe's typed notes put the conclusion at 1:36 p.m., apparently an hour off.) The parties discussed a variety of proposed articles, including insurance and management rights before lunch. After the noon break they launched into the Union's proposal on wages. TAF described its problem of being competitive with open shop contractors. Kehoe also pointed out that the Union's article 7 proposed various funds whereas TAF's article 7 does not. Other sections of the wage proposal were discussed. Most of the discussion concerned TAF's objections to the Union's wage proposal. Toward the end of the meeting Kehoe reached the Union's article 9. After limited discussion on it, Phillips said he had had enough for the day and the meeting ended.

Not until June did the parties correspond concerning arranging their next meeting. (R. Exhs. 212, 214.) By his letter (R. Exh. 215) of June 9 Turner concludes by requesting an advance copy of any proposal the Union intended to make at the next meeting. On June 22 Turner, after discussing proposed dates, wrote Phillips (R. Exh. 217) that:

> It is my understanding that Road Sprinkler Fitter Local Union No. 669 is entering into a settlement agreement with the National Labor Relations Board wherein Road Sprinkler Fitters Local Union No. 669 has agreed that ''United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL–CIO . . . WILL NOT refuse to bargain in good faith with Triple A Fire Protection, Inc. . . . by the piece-meal submission of our contract proposals, while failing and refusing to submit a complete contract proposal.''
>
> Triple A Fire Protection, Inc., hereby requests that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL–CIO ''submit a complete contract proposal'' to Triple A Fire Protection, Inc., forthwith and in no event not later than two (2) business days prior to our next scheduled meeting.

Correspondence about dates continued. Finally, the following exchange occurred, in conjunction with an agreement to meet on July 16. Turner, by letter of July 6, requests a ''complete contract proposal not later than Monday, July 13, 1992, in order that we may have an opportunity to review it before our meeting of Thursday, July 16, 1992.'' (R. Exh. 219.) By his letter of July 9 to Turner, Phillips, expressing his intent to negotiate as long as TAF bargains in good faith, advises that the Union ''desires to propose items in addition to the proposals already on the table.'' Phillips also states that he will make every effort to forward these proposals to Turner before the July 16 bargaining session. ''At any rate I will bring all proposals concerning such additional items to our meeting.'' (R. Exh. 220.) An updated list of the bargaining unit, requested by Phillips on July 9, was furnished by Turner's letter of July 10. (R. Exh. 221.)

The 10th and last meeting took place July 16, 1992. Phillips and David Lewis represented the Union, with Kehoe and Turner present for TAF. The agreed starting time was 10 a.m. There is no question that shortly before 10 a.m. Kehoe asked Phillips if the Union had a complete proposal. ''When the meeting gets started, I will present you a proposal,'' Phillips responded. (7:1336; G.C. Exh. 34 at 1; R. Exh. 223 at 1.) After some silence, talk ensued on unrelated events, focusing on coffee which arrived about 10:35 a.m. Again Kehoe requested the Union's complete proposed contract. Phillips responded that he had proposals to submit in his good time. He then protested that TAF had not made counters to the Union's proposals, including apprenticeship. Again Kehoe asked for the Union's complete contract that TAF could sign. Phillips said he was willing to sign if they reached agreement that day. Kehoe repeated her question. (R. Exh. 223 at 2).

Phillips then tendered the Union's article 5, a one-page article concerning hiring, and, as Lewis testified, Phillips ''commenced to start reading what was in article 5.'' (7:1336; R. Exh. 223 at 3.) Kehoe went into a ''trauma,'' Lewis testified, saying she did not want piece work, that she wanted a complete proposal. (7:1336.) Phillips continued reading the entire article, told Kehoe she was excused, and asked Turner whether he accepted the Union's article 5. At that point Kehoe said that TAF saw no point in further bargaining concerning the Union's piecemeal submission of its contract proposals. She said the meeting was adjourned until the Union submitted a complete contract proposal with TAF having an opportunity to review it. She asked when TAF could expect it. Rising, Phillips tendered to Kehoe several articles (6, 11, 12, 13, 15, 16, 20, 21, 23, 24, 26, 29, 30, 31, Addendum, a total of some 27 pages), saying, ''Here's your complete contract proposal. You have officially been presented with a contract. When you're ready to negotiate, call us.'' As the union representatives turned to leave, Kehoe said the meeting was adjourned to July 20. Phillips responded that she did not tell them when to meet, that she had ended the meeting, and that they would be in touch. They left about 10:45 a.m. (7:1337; R. Exh. 223 at 3.)

At trial Phillips was asked about not wanting Kehoe to be able to review the Union's proposals in the privacy of her

office. Phillips answered that he was not aware of any requirement that he do so, and that he had followed his understanding of what negotiations were all about. (7:1378–1379.) Phillips admits that frequently during negotiations he ''may have'' read (aloud) a union proposal to Kehoe and Turner before handing the document to them. (7:1379.) Asked why he waited from April 1991 to July 16, 1992, to present the Union's proposal for the hiring of men (article 5), Phillips testified, ''That was just the way I felt I should proceed in negotiations.'' (5:867.)

Following the meeting, Phillips wrote Turner a letter, dated July 16, expressing dismay that Kehoe, rather than showing a willingness to discuss the Union's proposals, had adjourned the meeting while attempting to dictate the date for the next meeting. Phillips concludes by stating the Union's willingness to meet, requesting Turner to contact him ''so we can agree on a future date to meet.'' (R. Exh. 224.) There has been no further contact between the parties concerning resumption of negotiations.

### 2. Discussion

Even if the Union's piecemeal bargaining would constitute, if alleged, an unfair labor practice, or bad faith here, the question remains whether the parties deadlocked over anything. The answer is no. Kehoe herself was ready to meet on July 20, and the Union's last request was for further negotiations. The cause for the lack of further negotiations has been TAF's refusal to answer the Union's request to meet.

Negotiations have been extensive, but not exhaustive. Granted, at times each party has acted in a manner suggesting that it is not overly concerned with whether the parties ever reach an agreement. But TAF fails to point to a single contract topic on which negotiations have come anywhere near to stalling, even as to that one item. At no point has either party expressed a final position on anything. They have not summarized the status of their negotiations, and have not exchanged a list of topics of tentative agreement and topics open. In short, I find that as of July 16, 1992, and as of the date of the trial, bargaining was not deadlocked on any topic, much less overall. No impasse was reached after the unilateral changes of April 22, 1991.

## CONCLUSIONS OF LAW

1. At least since October 1987 the Union, Sprinkler Fitters Local Union No. 669, has been the 9(a) exclusive bargaining representative of TAF's employees in a bargaining unit currently described as:

> All Journeymen Sprinkler Fitters and Apprentices employed by Triple A Fire Protection, Inc. who are engaged in all work as set forth in Article 18 of the national agreement of 1988–1991.

2. By various acts in February 1991 and March 1993, TAF violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with unit employees concerning wages, hours, and working conditions.

3. TAF violated Section 8(a)(5) and (1) of the Act when effective April 22, 1991, it unilaterally ceased making required fringe-benefit payments to established benefit plans.

4. TAF violated Section 8(a)(5) and (1) of the Act when effective April 22, 1993, it unilaterally reduced the wage rates for bargaining unit employees hired on or after April 22, 1991.

5. At no point in the contract negotiations after April 22, 1991, did the parties reach a deadlock, or impasse, in the bargaining.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Although TAF is a small employer and, as of the hearing, apparently in poor economic circumstances, TAF failed to establish that its financial condition is so poor that its very survival is at stake and failed to show the dire economic emergency required to justify its failure to make required payments to the benefit funds and to justify the unilateral reduction in wage rates for new employees. TAF cites no contrary authority and proposes no modified remedy which it submits would be appropriate. Accordingly, I shall order TAF to make whole the benefit funds for all contributions that would have been paid but for TAF's unlawful discontinuance of payments.[3] TAF must make unit employees whole as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

## ORDER

The Respondent, Triple A Fire Protection Inc., Semmes, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Sprinkler Fitters Local Union 669 as the exclusive bargaining representative of its employees in the unit described below by bypassing the Union and dealing directly with such employees and by unilaterally stopping payments to benefit funds and reducing wage rates for newly hired unit employees at a time when no impasse in bargaining with the Union has occurred.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[3] Because the provisions of employee benefit funds agreements are variable and complex, the Board leaves to the compliance stage the question whether the Respondent must pay any additional amounts into benefit funds in order to satisfy this make-whole remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All Journeymen Sprinkler Fitters and Apprentices employed by Triple A Fire Protection, Inc. who are engaged in all work as set forth in Article 18 of the national agreement of 1988–1991.

(b) If requested by the Union, resume participation in and contributions to the fringe-benefit plans to which Triple A Fire Protection, Inc. stopped contributions effective April 22, 1991.

(c) If requested by the Union, rescind any or all changes in wage rates or benefits unilaterally implemented effective April 22, 1991.

(d) Make whole the unit employees and fringe-benefit funds, in the manner set forth in the remedy portion of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Semmes, Alabama facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Sprinkler Fitters Local Union 669 as the Section 9(a) exclusive bargaining representative of our employees in the unit described below by bypassing the Union and dealing directly with you or by unilaterally stopping payments to benefit funds or by reducing wage rates for newly hired unit employees at a time when no impasse in bargaining with the Union has occurred.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All Journeymen Sprinkler Fitters and Apprentices employed by Triple A Fire Protection, Inc. who are engaged in all work as set forth in Article 18 of the national agreement of 1988–1991.

WE WILL, on request by the Union, resume as requested participation in and contributions to the benefit funds to which effective April 22, 1991, we unilaterally stopped contributing.

WE WILL, on request by the Union, rescind any or all changes in wage rates for new employees which we unilaterally implemented effective April 22, 1991.

WE WILL make whole all employees and the benefit funds, in the manner set forth in the National Labor Relations Board decision in this case, for all losses resulting from the unilateral changes we implemented effective April 22, 1991.

TRIPLE A FIRE PROTECTION, INC.